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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

THE CITY OF PHILADELPHIA and
POLICE OFFICER A. PANATI
Badge No. 2587,

Petitioners,

v.

DELORES SIMMONS, Administratrix of the
Estate of DANIEL LA FRISCOE SIMMONS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit, Civil Action No. 90-1118 Affirming the Judgment Order of the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 87-03258

BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI OF THE CITY OF PHILADELPHIA and POLICE OFFICER A. PANATI, BADGE NO. 2587

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Circuit Court follow settled law when it concluded that a low level municipal agent need not be found deliberately indifferent for a municipality to be liable under 42 U.S.C. Section 1983?
2. Whether the Circuit Court's review of the sufficiency of the evidence showed that the court did not find a waiver of the entire *Monell* issue?
3. Did the Circuit Court correctly conclude that plaintiff proved deliberate indifference by the City toward the class (group) of intoxicated and potentially suicidal pretrial detainees which caused the constitutional injury to the decedent?
4. Is a Circuit Court's prediction of how a state's highest court would decide an issue which such court had not authoritatively confronted a basis for the grant of certiorari?

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COUNTER STATEMENT OF THE CASE

A. Factual Background

Respondent adopts and incorporates the facts which are set in exquisite detail in the circuit court's opinion. (A-7 – A-18) They constitute an accurate summary of the factual underpinnings which firmly support the jury's verdict.

When reviewing the facts the principle that since the jury rendered a verdict for the plaintiff all inferences in favor to her must be taken from the evidence is applicable. *Healey v. Pa. R.C.O.* 184 F.2d 209, *cert. denied*, 340 U.S. 935 (1951). Not only does the City fail to follow this well-settled rule, but it also misstates, mischaracterizes and omits operative facts contained in the Opinions below.

The City contends that Officer Panati, the turnkey, directly responsible for the safety of the decedent, had no knowledge of the decedent's particular vulnerability to suicide. This assertion flies in the face of the jury's conclusion that Officer Panati was negligent and that such negligence was a substantial factor in causing the decedent's death. The jury also found the City negligent as well.[1]

Conspicuously absent from the City's factual rendition is that the officer recognized the unusual condition of the decedent at the time of his incarceration; that the decedent was visibly upset, that he was crying and

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1. It is appropriate to note liability was imposed upon the City for State law as well as Federal claims. Accordingly, even if this Court finds merit in the errors alleged in the 1983 aspect of the claim, the writ should be dismissed since this Court "reviews judgment, not opinions". *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). See, e.g., *Black v. Cutter Laboratories*, 351 U.S. 292, 297, 76 S.Ct. 824, 827, 100 L.Ed. 1188 (1956); *J. E. Riley Investment Co. v. Commissioner*, 311 U.S. 55, 59, 61 S.Ct. 95, 97 85 L.Ed. 36 (1940); *Williams v. Norris*, 12 Wheat. (25 U.S.) 117, 120, 6 L.Ed. 571 (1827); *McClung v. Silliman*, 6 Wheat. (19 U.S.) 598, 603 5 L.Ed. 340 (1821).

needed assistance in walking when he was brought into the police station. While in custody, he continuously rattled the cell bars, spoke incoherently, and was unresponsive and in a stupor the entire time that he was incarcerated. The turnkey further testified that he had no experience in recognizing suicidal behavior and that the only suicidal behavior he was familiar with was when an inmate tells you that they are going to commit suicide.

A further perversion of the evidentiary record revolves around the City directive which provides for checks of detainees every 15 minutes. Contrary to the City's contention of compliance with such mandate, the testimony revealed that Officer Panati was incapable of compliance with such schedule since other duties were prioritized by the City. These other duties were paramount from a "do first" point to his prisoner safeguarding responsibilities. Such duties included, inter alia, going outside the detention facility in order to pump gas and performing sundry maintenance duties throughout the building. Another impediment to reasonable supervision was the wall that separated his post from the cell block. Because of such wall, the only way that the officer would be able to see the decedent was if he were actually in the cell block in front of the cell where the decedent was placed. Additionally, the City fails to disclose the directive which requires that a detainee's shoelaces are to be removed immediately upon incarceration. Here, Panati initially failed to remove them and only did so after the decedent was in the cell and the officer saw that his shoelaces were flopping around, a fact that should have alerted him of the danger of this detainee.

These are just a few examples of less than candid summation of the testimony. Review of the Opinions below provides the real flavor of the facts which were the foundation for the verdict and its affirmance by the district and circuit courts.

B. The Proceedings Below

Respondent adopts as the proceeding below the Circuit Court's Opinion that is contained on pages A-21 to A-23.

The case proceeded to trial on the dual theories of negligence under Pennsylvania State Law and under 42 U.S.C. Section 1983. Liability was imposed upon the City on both the State and Federal claim.

Petitioner in the Proceedings Below portion of its Petition again raises issues of factual allegations which are incomplete or untrue as well as mischaracterizations of testimony and jury instructions. Since the aforementioned assertions are discussed in this section of petitioner's brief, Respondent will briefly touch upon the major misstatements and omissions.

Prior to trial, the former Police Commissioner, Gregory Sambor, was dismissed as a party because during discovery, the City designated pursuant to Fed.R.Civ.P. 30(b)(6) Notice of Deposition, Sgt. Heran from the City's Research and Planning Unit, whose department is responsible for drafting and implementing departmental policies and procedures. A summary of Heran's testimony that put before the jury the municipal policy of the City of Philadelphia in this area is contained on pages A-11 and A-12 of the Circuit Court Opinion. Sgt. Heran not only testified on behalf of the plaintiff concerning police policy, directives, training and prior suicides, but also testified for Petitioner in its case in chief, not as a rebuttal witness as asserted by the City. He was the individual called by both parties because of his designation by the City of Philadelphia as its spokesperson in this area. In fact, police policy directives concerning prisoner safety which he testified about were endorsed by command of the Police Commissioner.

The City also misstates the jury instructions with respect to municipal liability. At no time as the City asserts did it request the court for a jury instruction that stated "the City is liable" under section 1983 "only if the

officer acted with deliberate indifference". Nor was the instruction that was given objected to by the City.[2] (Resp. App.)

Furthermore, with respect to training, petitioner again mischaracterizes the instruction given by the trial judge and coincidentally omits an integral part of the instruction.[3] (Resp. App.)

The case was then submitted to the jury on special interrogatories. The jury specified that it did not find Panati liable to plaintiff under Section 1983 for depriving Simmons, under the color of state law, of his constitutional rights. The jury found, however, that Panati had committed torts against Simmons under Pennsylvania law. The jury responded "Yes" to the further questions whether the City was liable under section 1983 for violating Simmons's constitutional rights and had committed torts against Simmons under Pennsylvania law. The jury also found that the actions of both Panati and the City were legal causes of harm to Simmons. The jury awarded plaintiff $10,000.00 in wrongful death damages and $990,000.00 in survival damages. (A19-A20)

The remainder of the proceeding below and issues raised on appeal are accurately discussed on pages A-21-A-30 of the Circuit Court Opinion.

2.-3. Excerpt from Court of Appeals Appendix of the jury instruction relating to municipal liability is set out in the appendix to this brief. ("Resp. App. 1b-3b")

REASONS FOR DENYING WRIT OF CERTIORARI

I. THE ARGUMENT URGED BY PETITIONERS FOR REVIEW OF *SIMMONS* ARE BASED ON AN INACCURATE INTERPRETATION OF SETTLED LAW AND MISCHARACTERIZATIONS OF FACTS, EVIDENCE AND JURY INSTRUCTIONS

In support of their Brief, Petitioners advance four spurious propositions for granting certiorari. When properly brought into focus, each of the propositions in fact support denial of the Writ.

A. THE CIRCUIT COURT FOLLOWED SETTLED LAW WHEN IT CONCLUDED THAT A LOW LEVEL MUNICIPAL AGENT NEED NOT BE FOUND DELIBERATELY INDIFFERENT FOR A MUNICIPALITY TO BE LIABLE UNDER 42 U.S.C. SECTION 1983

The case proceeded at trial on two theories of liability: (1) Negligence and (2) Section 1983 of Title 42 U.S. Code. Both of those theories had separate and distinct requirements for imposition of liability for the individual defendants and the municipal agent. The trial judge instructed the jury in accordance with Pennsylvania State Negligence Law respecting the elements necessary to hold the individual officer liable as well as to hold the City of Philadelphia liable. This dichotomy of instructions, necessitated by the differing standards of proof for the separate defendants, was followed by the trial judge with respect to the 1983 claims as well. The jury in accordance with the holdings of *Monell v. New York City Department of Social Services,* 436 U.S. 658 (1978) and *City of Canton v. Harris,* 489 U.S. 378 (1989) was given separate instructions as to what they would have to find to hold the City of Philadelphia liable and to hold the officer liable. (Respondent's Appendix 1b-3b).

The case was submitted to the jury on special interrogatories. The jury found the individual officer

negligent but not violative of Section 1983. The City of Philadelphia was found to be both negligent and liable under Section 1983. (A-19-A-20)

When the Trial Court instructed the jury on municipal liability under Section 1983, contrary to the City's assertion there was no instruction which required that the jury must find that the officer acted with deliberate indifference as a prerequisite to find the City liable. Further, the instructions that were given in this area were not objected to by the city. This mythical jury instruction which requires officer Panati to be held liable under section 1983 as a prerequisite to municipal liability which was never requested, coincidentally now forms the crux of the argument for the City requesting this Honorable Court to grant certiorari.

Petitioner, in essence, is arguing that an employee's primary liability for a constitutional tort is a prerequisite to municipal liability for a constitutional violation rising from either a policy or custom or from a failure to train. This argument was rejected by both the District and the Circuit Court. In reasserting this argument before this Honorable Court, the petitioner is stating that the Circuit and District Court's Opinion conflict with the settled law in this area. This is clearly not the case. The Learned Circuit Court Judge discusses on pages A-32 through A-47 his analysis of the jurisprudence of the predicates of establishing direct municipal liability for a policy or custom, as well as a deliberate failure to train.

Judge Becker comes to the conclusion that there can be direct liability of a municipality although the individual officer in this case was not deliberately indifferent as a result of an analysis which discusses the dictates of not only *Monell v. New York City Department of Social Services,* 436 U.S. 658 (1978) and *City of Canton v. Harris,* 489 U.S. 378 (1989) but also *Pembaur v. Cincinnati,* 475 U.S. 469 (1986), *City of St. Louis v. Praprotnick,* 485 U.S. 112 (1988), and *Jett v. Dallas Independent School District,* 491 U.S. 701 (1989), (*Pembaur* trio).

"In my opinion, reading *Monell* and *Canton* in light of the *Pembaur* trio resolves the ostensible inconsistency in the jury's section 1983 verdicts in this case and reveals that the district court's, the City's, and plaintiff's differing perspectives on whether employee liability is a prerequisite to establishing a municipality's section 1983 liability, although ultimately incomplete, are complementary, rather than mutually exclusive. I believe that the district court and plaintiff are correct in reasoning that plaintiff need not have established deliberate indifference on the part of Panati. Further, I believe that the City is correct insofar as it contends that plaintiff, in order to prove either her municipal policy or custom or her failure to train theory, must have adduced evidence of scienter on the part of a municipal actor. In my opinion, however, under the *Pembaur* trio, and *Jett* in particular, the scienter-type evidence must have been adduced with respect to a high-level official determined by the district court, in accordance with local law, to have final policy making authority in the areas in question. Because Panati, a low-level employee, is not the City actor whose primary section 1983 liability must have been established as a predicate to subjecting the City to section 1983 liability for a policy or custom or a failure to train, I find no inconsistency in the jury's section 1983 verdicts in this case." (A-41-42)

Had Officer Panati been trained by the City of Philadelphia with respect to intoxicated detainees and suicidal detection, the City would have established a policy and training program that was constitutional and not deliberately indifferent to a serious medical need. Once having given the training, the only potential civil rights violation would be if the jury found Officer Panati deliberately indifferent, since the City would have satisfied its constitutional requirements.

Here, the opposite was the case. It was clear from the evidence that the initial actor who had notice and knowledge of a known serious medical need was the City of Philadelphia and not the police officer. The City, in view of the notice it acquired, had the constitutional obligation to establish a policy, inform its police officers and institute a training program. It was their failure to do this which the jury found to be deliberately indifferent.

The situation was markedly different with Officer Panati. Although the jury found him to be negligent, the City's own constitutional breach prevented the Officer from being deliberately indifferent. Absent the knowledge that he was denied, due to the City's 1983 violation, there was no basis for the jury to conclude that he had the required knowledge, as the City did, to be deliberately indifferent. Under the City's theory of the law, when an individual officer's acts do not rise to the level of deliberate indifference because he did not possess the requisite knowledge of a serious medical need by virtue of the City's failure to train and alert him of that need, the City would remain immune from suit. Thus, by utterly failing to train, the City could absolutely avoid liability. Such a result if absurd, contrary to the prophylactic intent of the civil rights statute and the cases interpreting same. *City of Canton*

The argument advanced by the City of Philadelphia that a low level employee such as a turnkey would have to be shown to have been deliberately indifferent as a requisite to municipal liability for a constitutional violation arising either from a policy or custom or from a failure to train is an improper characterization of existing law. (See Opinion pgs. A-32 to A-47)

As concluded by Judge Becker, there is no requirement that the low level employee act deliberately indifferent. Rather, the obligation upon the plaintiff is to merely show that the constitutional infraction of the municipality or its policymakers constituted a nexus

between or which allowed a neglect of the plaintiff's medical needs which caused his constitutional injury.

The jury's verdict in accordance with the jury instructions clearly demonstrates the existence of a nexus here.

It is clear from the discussion in the majority and concurring (opinion that plaintiff's theory and proof that the decedent's rights were violated as a result of a municipal policy and custom of deliberate indifference to a serious medical need and failure to train are consistent with the holdings of *Monell* and *Canton*.

B. THE CIRCUIT COURT'S REVIEW OF THE SUFFICIENCY OF THE EVIDENCE SHOWS THAT THE COURT DID NOT FIND A WAIVER OF THE ENTIRE *MONELL* ISSUE.

The City in its petition raises the issue that the majority opinion erred in holding that the City waived the entire *Monell* issue by not objecting to plaintiff's failure to prove scienter-like evidence against high-level officials.

The lead opinion observed that the City did not ground either in its motion for a directed verdict or in its Motion for J.N.O.V. on the failure by the plaintiff to identify a high-level official who was responsible for the City policy. Neither did the City raise this issue at trial or on appeal and this issue is before this Honorable Court for the first time.

It is well-settled that the Supreme Court will not decide questions not raised or litigated in the lower courts. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257 (1987); *State v. Taylor*, 353 U.S. 553, 556 (1957). Furthermore, this Honorable Court has held that where the Court of Appeals has held that a contention has been waived because not briefed or mentioned in oral argument, the Supreme Court will not recognize such a contention on certiorari. *State v. Taylor, supra.*

This Court has further stated that the rule where this court will not decide questions not raised or litigated

in the lower court has special force where the parties seeking to argue the issue has failed to object to a jury instruction. *City of Springfield, Mass. v. Kibbe, supra.*, pg. 259. Here, petitioner failed to raise any objections with respect to the jury instruction which discussed policy and training as previously set forth.

Petitioner is also alleging under this section of the petition that the majority opinion concluded that the City had waived the entire *Monell* issue. This is clearly a false assertion. On the contrary, the Circuit Court Judge states on page A-51 that the City did preserve its contention that plaintiff introduced insufficient evidence to support her Section 1983 claim.

As the Learned Judge stated,

> "I have concluded that the City has preserved in part its contention that plaintiff adduced insufficient evidence to support her section 1983 claim against it. In light of the City's waiver at both trial and appellate levels of the argument that plaintiff failed to establish the essential "scienter" element of her case, I additionally conclude that, in weighing the sufficiency of the evidence, we must assume: (1) that some responsible City policymaker was aware of the number of suicides each year in City lockups and of the availability of training and other alternatives, such as physical feature changes and specific suicide-prevention directives for officers, likely to prevent them; and (2) that this policymaker(s) either deliberately chose to take no preventive measures or acquiesced in a longstanding practice or custom of inaction with respect to the prevention of suicides in City lockups. I believe that were we to weigh the sufficiency of the evidence as to these two scienter-like elements of plaintiff's section 1983 claim against the City, we would, in effect, permit the City, under the rubric of its challenge to the sufficiency of the evidence, to raise the issue whether plaintiff has established these elements of

her case – the very theory of appealability that I have rejected as inconsistent with our well-established rules of waiver and appellate procedure.

The focus of my inquiry therefore is narrowed to the remaining 'duty' and 'causation' elements of plaintiff's case. I believe that the essential question that must be asked, with respect to plaintiff's municipal policy or custom and failure to train theories of the City's liability, is whether the evidence is sufficient to establish that the City policymakers' chosen or acquiescent course of instituting no suicide prevention measures (1) rose to the level of a breach of its constitutional duty to intoxicated and potentially suicidal detainees that (2) caused Simmons's suicide.

The evidence with respect to these remaining elements of plaintiff's section 1983 case against the City clearly must be weighed in a highly deferential manner. In determining whether the district court erred in denying the City's motion for judgment notwithstanding the section 1983 verdict, 'we must review the record in the light most favorable to the non-moving party . . . and 'affirm the judgment of the district court denying the motion[ ] unless the record is critically deficient of the minimum quantum of evidence from which a jury might reasonable afford relief.' " *Kinnel v. Mid-Atlantic Mausoleums, Inc.,* 850 F.2d 958, 961 (3d Cir. 1988) (citation omitted); see *Clark v. Township of Falls,* 890 F.2d 611, 617 (3d Cir. 1989) (same). (A-51-52)

Petitioner further alleges that the concurring opinion expressed dismay over easily anticipated problems that the majority opinion creates for future cases. It is clear that the requirement of scienter-like evidence is one of a heavier burden on the part of the plaintiff to prove in order to hold a municipality liable. The crux of the concurring opinion is that there is no requirement by

the Supreme Court that actual knowledge of the conditions by a municipal policyholder be a condition of municipal liability. Judge Sloviter eliminates the need for scienter-like evidence and bases her affirmance on the standard set forth in *City of Canton*.

In the instant matter Judge Sloviter states:

> "If a city cannot be held liable when its policymakers had notice of a problem and failed to act, then it is difficult to posit a set of facts on which a city could be held to have been deliberately indifferent." (A-116)

In essence, this is a thinly disguised argument which goes to the sufficiency of the evidence. The petitioner is arguing that there was insufficient evidence upon which a jury could reach a verdict. It is clear that the District Judge, the Circuit Judge and the jury found there was sufficient evidence to reach a verdict or affirm a judgment.

C. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT PLAINTIFF PROVED DELIBERATE INDIFFERENCE BY THE CITY TOWARD THE CLASS (GROUP) OF INTOXICATED AND POTENTIALLY SUICIDAL PRETRIAL DETAINEES WHICH CAUSED THE CONSTITUTIONAL INJURY TO THE DECEDENT

The City's contention that the circuit court "conjured up [a] class" (Petition p. 22) comprised of Daniel Simmons and prior suicide detainees "misses the mark". (A-60) In actuality, the court concluded that the plaintiff unequivocably established that the City was deliberately indifferent to the reasonably identifiable class (group) of intoxicated and potentially suicidal detainees. (A-60-61) The court further reasoned that such deliberate indifference to the defined group (class) was the cause in fact of the constitutional injury inflicted upon Daniel Simmons individually.

> "Plaintiff's contention is not that the City showed deliberate indifference toward Simmons individually. Plaintiff, rather, sought to establish at trial that the City showed deliberate indifference toward the class of intoxicated and potentially suicidal pretrial detainees to which Simmons belonged and that this deliberate indifference toward the class caused a constitutional injury to Simmons individually." (A-60-61)

Judge Becker's categorization of a class was a demonstrative tool utilized to showcase the evidentiary sufficiency of the notice element which is the keystone of the jury's finding of deliberate indifference. Had Daniel Simmons been the first intoxicated detainee to commit suicide, plaintiff would have had a much more difficult road to hoe in proving notice, a hurdle to any deliberately indifferent claim. Here, the evidence was unequivocal that the City had actual knowledge of the serious medical needs of intoxicated and potentially suicidal detainees and actual knowledge of fourteen prior suicides of detainees in that group. Based upon such factual foundation, the jury reasonably concluded that the City was deliberately indifferent to that class/group of individuals by failing to take appropriate action to prevent the fifteenth such suicide, that of Daniel Simmons. When a member of an easily identifiable group such as Daniel Simmons is injured (here mortally) as the direct result of deliberate indifference previously exhibited to other individuals of similar standing, he has proved a constitutional deprivation.

The City's obfuscated assertions in its third reason for the grant of certiorari reveals a thinly veiled contention that the evidence was insufficient to support the jury's finding. The circuit court, as evidenced by its comprehensive opinion, conducted an extensive and exhaustive review of the record and concluded otherwise. Plaintiff's theory of liability under Section 1983 was based on two separate theories of liability: (1) a

Section 1983 defective municipal policy or custom and/or (2) a failure to train its officers, breached a constitutional duty to intoxicated and potentially suicidal detainees. The Court of Appeal's analysis of the sufficiency of the evidence with respect to the municipal custom or policy allegation appears at A-60 to A-72. Upon concluding such analysis, Judge Becker observes as follows:

> "I also think that there is sufficient evidence in the record to support a jury conclusion that the City's deliberate indifference to the serious medical needs of intoxicated and suicidal detainees was, as *Monell* requires, the 'moving force' behind a violation of Simmons's fourteenth amendment rights." (A-71)

A similar result follows the sufficiency analysis respecting plaintiff's failure to train theory, which appears at A-72 to A-77. Judge Becker again leaves no doubt that plaintiff satisfied the evidentiary muster required to support the jury's finding as a matter of law:

> "Based on all of this record evidence, I cannot conclude that the record is critically deficient of evidence on which the jury reasonably could have based the conclusion that the City's deliberately indifferent failure to train its officers was an actual cause of Simmons's death." (A-75-76)

Chief Judge Sloviter who concurred in the judgment, but who did not join in the lead opinion because she felt it articulated a higher standard of proof than required by this Court, conducted her own independent sufficiency test. Judge Sloviter's succinct summary of the operative facts and the "a fortiori like" conclusion that follows, overwhelmingly supports the jury's finding:

> "Instead, using the *City of Canton* standard, I would hold that the evidence of 20 jail suicides in Philadelphia prisons between 1980-85, of whom 15 were

intoxicated, the City's possession of knowledge before 1981 that intoxicated detainees presented a high risk of suicide, its awareness of published standards for suicide prevention, and its failure to implement the recommendations of experts, including its director of mental health services for the prison system, was sufficient basis for the jury to have found that unnamed officials with responsibility over the City's prisons acted recklessly or with deliberate indifference, thereby contributing to the deprivation of constitutional rights of plaintiff's decedent. *If a city cannot be held liable when its policymakers had notice of a problem and failed to act, then it is difficult to posit a set of facts on which a city could be held to have been deliberately indifferent*." (Emphasis supplied). (A-116)

D. THE CIRCUIT COURT'S PREDICTION OF HOW A STATE'S HIGHEST COURT WOULD DECIDE AN ISSUE THAT SUCH COURT HAD NOT AUTHORITATIVELY CONFRONTED IS NOT A BASIS FOR THE GRANT OF CERTIORARI

The City's use of the characterization "conjured up" in connection with the Circuit Court's analysis is a label more aptly utilized in connection with the City's fourth reason for granting of certiorari. Recognizing that the issue presented here raises no question of Federal import and involves solely State law issues which were dealt their death knell by the Circuit Court Opinion, petitioner "conjures up" the allegation that the majority failed to follow this Court's decision in *Erie v. Thomkins,* 304 U.S. 1188 (1938). The fraility of the City's claim is demonstrated by the fact that nowhere in the five pages of the petition that comprise this issue does the City articulate the nature of the Circuit Court error respecting *Erie*. Not only is the City's claim pale, but it is totally lacking any color whatsoever. The allegation respecting

Erie is a red herring aptly labeled as a feeble attempt to metamorphasize into a Supreme Court issue one that clearly isn't.

A cursory examination of what the City actually argues, in contradistinction to the heading, discloses that the City is requesting review bottomed upon a contention that the Circuit Court improperly predicted how the Pennsylvania Supreme Court would decide a wholly State issue. The de facto issue presented by the City has no Federal import and is clearly mutually exclusive of the enumerated categories illustrative of the basis for exercise of the Supreme Court's discretionary review. Before the Court is a matter which strictly involves an interpretation of the State law issue as to whether or not the City has the right, as it has done here, to waive immunity for certain tortious conduct of its employees.

The role of a Federal Court when confronted with a State law issue not directly confronted by that state's highest court is characterized by Trial Judge Van-Antwerpen as follows:

> "When the highest court of the state has not authoritatively considered an issue, 'our disposition of such cases must be governed by a prediction of how the state's highest court would decide were it confronted with the problem.' *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 661 (3d Cir.1980), *cert. denied*, 449 U.S. 976, 101 S.Ct. 387, 66 L.Ed.2d 237 (1980). See also *Becker v. Interstate Properties*, 569 F.2d 1203, 1205 (3d Cir. 1977), *cert. denied*, 436 U.S. 906, 98 S.Ct. 2237, 56 L.Ed.2d 404 (1978). In this effort, the Federal court must give 'proper regard' to the relevant rulings of other courts within the state. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465, 87 S.Ct. 1776, 1783, 18 L.Ed.2d 886 (1965). See also *Erie Castings Co. v. Grinding Supply, Inc.*, 736 F.2d 99, 100 (3d Cir.1984). (A-156-157)

Applying this standard and after reviewing the pertinent stare decisis principles, the District Court concluded:

> "We believe that *Skibo*, the Pennsylvania Supreme Court case cited by the City, does not address the precise issue under discussion. *Middleton*, although a Commonwealth Court decision, does so address that issue. Given the guidance provided by an intermediate state court decision directly on point with regard to the issue in the case at bar, we believe that *Skibo* is inapplicable. We choose, instead, to follow *Middleton*, and, accordingly, find the City's waiver of immunity under the City Ordinance in question to be proper." (A-159)

The obligation of the district and circuit court to follow an intermediate appellate opinion, as specifically enunicated in *Hicks v. Feiock*, 486 U.S. 624 (1988) was satisfied.

The Circuit Judges comprising the majority conducted their own independent analysis of this issue which appears in the record at pages A-103-107. In agreeing with the District Court that the City could waive immunity, the Circuit Court set forth its position in the following manner:

> "In the absence of a controlling decision of the Pennsylvania Supreme Court of legislative action by the Pennsylvania General Assembly, however, we think that the factors considered above tip the balance in favor of this interpretation of the statute and its legislative history. We, therefore, hold that the PSTCA did not serve to nullify the City's ordinance waiving liability arising from the negligence of its police officers." (A-106-107)

Both the District Court and Circuit Court have uniformly predicted how the Pennsylvania Supreme Court would act if confronted with the immunity issue.

The scarce resources of the United States Supreme Court do not allow for this prediction to be reviewed once again.

The allegation that the Circuit Court failed to follow the dictates of *Erie v. Thomkins, supra.*, is patently misleading. Circuit Judge Becker specifically addresses the obligation of a federal appellate court under the teachings enunciated in *Erie*. As a result of its *Erie* analysis, the Court decides that the district court's finding that the City waived the immunity issue was an erroneous conclusion.[4] The issue of immunity was found to be one of substance rather than procedure, thereby imposing upon the Circuit Court the obligation to review the claim on the merits as disclosed by the following:

> "For this reason, the panel is in agreement that the Pennsylvania Supreme Court's rule must be regarded as substantive for *Erie* purposes and must be applied in this case to permit appellate consideration of the City's immunity argument." (A-101-102)

After specifically addressing the substance of the City's argument, precisely what was required of the court by *Erie*, the majority in furtherance of its obligation to predict what the Pennsylvania Supreme Court would do if confronted with this issue concludes that immunity is waivable by the City:

> "In the absence of a controlling decision of the Pennsylvania Supreme Court of legislative action by the Pennsylvania General Assembly, however, we think that the factors considered above tip the balance in favor of this interpretation of the statute and its legislative history. We, therefore, hold that

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4. Although the district court found there was a waiver, it nevertheless addressed the issue of how the Pennsylvania Supreme Court would decide the issue of immunity. (A-154-159)

the PSTCA did not serve to nullify the City's ordinance waiving liability arising from the negligence of its police officers." (A-106-107)

Under *Erie v. Thomkins*, the circuit court had the obligation to consider the immunity issue. It did. Just as the district court predicted, the circuit court predicted that the Pennsylvania Supreme Court would allow a waiver. No further predictions or review is warranted for this wholly state law issue which is totally void of any Federal statutory or constitutional significance.

II. CONCLUSION

As the trial judge observed:

"The City clearly owed something more to a young man whose only transgressions were having too much to drink and being in a public place." (A-161-162)

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Excerpt from Court of Appeals Appendix (A655-A659)

APPENDIX

I have told you that with regard to the officer, you must find deliberate indifference. Now the plaintiff also claims that the municipality – that is that the City of Philadelphia – is liable for depriving the prisoner in this case of his Constitutional rights. And if you find that under the facts that the deceadent – the prisoner – was deprived of Constitutional rights, the City of Philadelphia may also be liable if the deprivation of rights was done pursuant to a Governmental policy.

Now this term policy is a broad one. It includes an ordinance or regulation, a decision, a custom or a practice. It doesn't have to be written. The policy may be inferred from informal acts or ommissions of supervisory – that is policy making – municipal officials.

When someone is injured as a result of the Governmental policy by officials who's edicts or acts may fairly be said to represent official policy of a municipality or the city, the city, itself, is responsible for the injury it caused. There must be a policy.

Now, when policy making municipal officials, with the responsibility to prevent harm, fail to establish or execute appropriate procedures for preventing serious malfunctions in the administration of justice, such failure can amount to a policy which is a violation of the Constitution.

I've said there must be a policy. And I've said that in the case of a policy making official, who has a responsibility for preventing harm, that the failure to establish or execute appropriate procedures for prevention of serious malfunctions in the administration of justice can amount to a policy which is a violation of the Constitution. And I want to stress that it must be an official with policy making ability. Acquiesence or simply going along with such an official's subordinates or the mere failure to

investigate a subordinate's actions, does not amount to the delegation of policy making authority to a subordinate.

Let's talk about training. With regard to training or failure to train officers properly, there is no policy — there is no Constitutional violation — unless the failure to train properly amounts to reckless disregard or deliberate indifference.

And this would reaquire a showing, first of all, of the knowledge by the municipality or policy making officials of the municipality, knowledge of a pattern of similar incidents — that is similar suicides. And secondly, circumstances amounting to a communication of a message of approval to the offending subordinates.

If you were to find those two elements proven, you could find, again, the existance of a policy. Negligence is not enough. There must be a policy for a Constitutional violation.

Now, as I understand it, the plaintiffs maintain in this case that they have presented evidence of a policy on behalf of the City of Philadelphia. You may consider the directives which have been referred to — the written directives — in determining whether or not there was a policy, which was responsible for the injury to the deceadent. You may also consider whether the detention facilities in which he was kept are adequate.

Now, I want to warn you that the mere failure of a detention facility to comply with detention standards, standing alone, does not violate the Constitution. But you may consider that, if you find that to be so, as evidence.

And the plaintiffs maintain that by reason of the directives which were in effect, which were referred to, that they have shown you that there was a policy in effect. And that that policy was inadequate and that that policy was responsible, was a legal cause, a proximate cause of injury, of the death of the deceadent.

And again, just as I told that there is no dispute that the officer was acting pursuant to the color of the

authority of the Commonwealth of Pennsylvania, the same is true of the municipality.

And the plaintiffs maintain that they have proven that this policy, as I have defined it for you, which is found in the directives and which may be inferred by you in the way I've just described it to you, was a direct cause, a proximate cause, a legal cause or a substantial factor. Because it increased the risk of harm. That this was a cause – a legal cause – of the death of the deceadent. That is for you to determine.

With regard to the contentions of the plaintiff, the defense maintains that the plaintiffs have not proven their right to recover by the fair weight of the preponderance of the evidence. They maintain that with regard to the actions of the officer that there was not sufficient reason for him to have know or in which he should have known of the suicidal tendencies of the deceadent. And that what he did did not amount to a deliberate indifference, deliberate disregard.

They further maintain with regard to the City of Philadelphia, that there are directives, but that the directives were not responsible for the death of the deceadent. And that you should not find that plaintiffs have proven their right to recover by the fair weight or the preponderance of the evidence. That again is for you, and you alone, to determine

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